Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ------ 71-916

HERBERT KAUFMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HERBERT KAUFMAN,
In Proper Person,
1615 W. North Avenue,
Baltimore, Maryland 21217.

The Daily Record Co., Baltimore, Md. 21203

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To the Honorable Warren E. Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Herbert Kaufman for a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit entered in the above case.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals has not yet been published, but will be found in the Appendix at pp. 1a-2a.

JURISDICTION

The decision of the Court of Appeals was made on December 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the Petitioner improperly denied the right to counsel in the District Court?

2. Were the Petitioner's constitutional rights violated by the Court of Appeals' refusal to permit oral argument?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution.

The Sixth Amendment to the Constitution.

STATEMENT OF THE CASE

On October 10, 1970, Petitioner was tried by a jury and convicted. The conviction was affirmed by the United States Court of Appeals on December 23, 1971, without affording the Petitioner the chance for oral argument.

The Petitioner was placed in the position of having his assets and sources of income seized by the United States with jurisdiction over those assets in one Court and with the Tax Court having jurisdiction over the Petitioner's proposed tax liabilities. The result of seizing the Petitioner's assets was that he was not technically a pauper and could not, on the other hand, afford to hire a lawyer of his own choice. It would, therefore, have proven of no value to file paupers petition merely to have the petition denied. The Respondent took away the Petitioner's ability to hire a lawyer by seizing his assets and, at the same time, Petitioner could not technically qualify as a pauper.

In regard to the Appellate proceedings, the Fourth Circuit should have given the Petitioner an opportunity to be heard on oral argument. The Petitioner was pro se in that Court and his brief may not have properly presented his views. The presentation of those views orally was a necessary prerequisite to permit the Petitioner to fully develop his positions.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Petitioner was denied his right to counsel under the Sixth Amendment and his right to due process of law under the Fifth Amendment by the failure of the District Court to determine that the in forma pauperis proceeding was not adequate in the case of this Petitioner whose funds were seized by the United States and who was contesting a tax liability against the United States.

The Petitioner was denied due process of law by the failure of the Fourth Circuit Court of Appeals to permit him oral argument.

CONCLUSION

Wherefore, Herbert Kaufman, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals in the above entitled case.

HERBERT KAUFMAN,
Proper Person,
Petitioner.

APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 71-1461

United States of America,

Appellee,

v.

Herbert Kaufman,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Decided December 23, 1971.

Before Butzner, Russell, and Field, Circuit Judges.

Herbert Kaufman pro se on brief; George Beall, United States Attorney for the District of Maryland, and Jeffrey S. White, Assistant United States Attorney, on brief for appellee.

Per Curiam:

Herbert Kaufman was tried by a jury and found guilty on seven counts of an eight-count indictment charging him with conspiracy to defraud the government, filing a false claim, perjury, and subornation of perjury. His principal assignments of error are that an attorney of his choice was not appointed to assist in his defense in the district court and that he was not mentally capable of defending himself in those proceedings.

There is no evidence in the record that Kaufman lacked sufficient funds to retain an attorney to represent him. He has not shown either by testimony or by way of an affidavit that he is without adequate resources to provide his own counsel. United States v. White, 344 F. 2d 92 (4th Cir. 1965). On appeal Kaufman was told that he could have counsel if he was indigent, but he refused to execute an affidavit of financial status to establish his indigency. He was not, therefore, entitled to court-appointed representation in the district court or on appeal.

Before sentencing, the district judge received psychiatric reports, but the privately retained doctors who prepared them did not testify. One of the reports expressed an opinion that Kaufman could not conduct his own defense. The district judge, however, previously had ample opportunity to observe Kaufman's ability to defend himself. We find no error in his refusal to give full credence to the doctor's opinion, which was formed after the trial.

We find no merit in Kaufman's other contentions.

The motion for a summary reversal is denied. We deem oral argument to be unnecessary and affirm the decision of the district court.

AFFIRMED.

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In the Supreme Court of the United States

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HERBERT KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on seven counts charging conspiracy to defraud the government (18 U.S.C. 286), perjury (18 U.S.C. 1621), subornation of perjury (18 U.S.C. 1622), and filing a false claim against the United States (18 U.S.C. 287). He was sentenced to two years' imprisonment.[1] The court of appeals affirmed

[1] The charges arose out of a claim for return of cash bail which was filed by petitioner's daughter. She claimed, and petitioner supported her claim, that the money belonged to her and not to petitioner, and therefore was not subject to tax liens against petitioner.

per curiam without oral argument (Pet. App. 1a-2a).

Petitioner contends that he was improperly denied appointment of counsel to assist in his defense although he admits that he could not qualify as a pauper. At petitioner's arraignment on February 20, 1970, he asked for release of funds which were subject to tax liens. The government pointed out that, several years before, a week after petitioner had said he had no money to operate his business, he was arrested and found to have over $70,000 in cash and negotiable instruments in his pocket as well as business cards of three Swiss bank agents (Feb. 20, Tr. 9).[2] The court offered to appoint counsel for petitioner, but petitioner said that, if he could not have counsel of his own choosing, he would represent himself (Feb. 20, Tr. 15-16). The court released petitioner on an unsecured $5,000 bond but subsequently refused to permit petitioner to travel to Europe (Feb. 20, Tr. 16, 22-24). Permission was later granted and petitioner did in fact go to Europe.

Trial of the case was set for July 15, 1970. At a pre-trial conference on July 9, 1970, the court told petitioner that no continuance would be granted if petitioner did not have a lawyer. That afternoon petitioner left with the judge a letter formally requesting a continuance and stating that he had arranged for counsel (July 10, Tr. 3). The case was continued on condition that the attorney enter an appearance (July 10, Tr. 12).

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[2] We are filing copies of the pertinent transcripts.

After the case was continued to October, the attorney filed a motion to strike his appearance on the basis of a letter from petitioner that petitioner was unable to pay his fee and wished to represent himself (Oct. 12, Tr. 10-12). Petitioner did represent himself at trial.

After conviction, petitioner asked for appointment of counsel on appeal but the district court found that petitioner was not without funds. It noted that a letter from petitioner's counsel with respect to petitioner's tax liabilities indicated that there would be a settlement "which would seem to indicate that there are funds available somewhere" (March 18, 1971, Tr. 9). The court of appeals offered to appoint counsel for petitioner if he would file the affidavit of indigency but petitioner declined to do so.[3]

It is evident from these facts that petitioner could have had counsel if he wished one, but deliberately chose to act as his own attorney. Moreover both the district court and the court of appeals were willing to appoint counsel for petitioner if he was in fact, as he claimed, a pauper, but petitioner was, as he admits, unable to state under oath that he was a pauper.[4]

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[3] The clerk also suggested that petitioner could employ the attorney who was representing him before the Fourth Circuit with respect to his civil tax liability.

[4] Petitioner has not shown that denial of oral argument of the appeal infringed his constitutional rights or was an abuse of discretion by the court of appeals. *Payton* v. *United States*, 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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